Fair Political Practices Commission
MEMORANDUM

To: Chairman Getman, Commissioners Downey, Knox, and Swanson

From: Lawrence T. Woodlock, Senior Commission Counsel
Luisa Menchaca, General Counsel

Subject: Expenditures at the Behest of Candidates or Committees.
Adoption of Amendments to Regulation 18225.7;
Adoption of Regulation 18550.1.

Date: February 21, 2003

Introduction

Since 1995, regulation 18225.7 has defined expenditures "made at the behest of" a candidate or committee. Attempting to make these rules more clear, staff revised regulation 18225.7 and presented draft amendments to the Commission at its monthly meetings in July and September, 2002, and again in January, 2003.

In January, staff proposed both to amend regulation 18225.7, and to add a new regulation 18550.1 to interpret § 85500(b), an idea first suggested at the September meeting. In January, the Commission asked for further work on the language of both regulations, notably:

- To draft the presumptions of regulation 18225.7(c) more narrowly, particularly the "joint employment" presumption;
- To expand and revise the "safe harbor" provisions of both regulations; and
- To include in regulation 18225.7 a "safe harbor" for information exchanges among committees.

The Commission also requested additional guidance on the interplay between regulation 18225.7 and proposed regulation 18550.1. The introductory portion of this memorandum accordingly explains the scope of regulation 18225.7 and proposed regulation 18550.1, showing that regulation 18550.1 would treat a subclass of the campaign communications governed by the current regulation 18225.7. A separate regulation 18550.1 is not necessary, although it may be desirable. Both regulations describe candidate involvement in an expenditure by another person, but regulation 18225.7 is applicable to more persons and to more kinds of expenditures than proposed regulation 18550.1. The second half of the memorandum summarizes the regulations' language, discussing in detail areas on which the Commission requested further comment.

A. The Scope and Function of Regulation 18225.7

Regulation 18225.7 is the Commission's definition of the term "made at the behest of," which is used in §§ 82015, 82031, 85303 and 85310 to describe coordination between a candidate or committee and some other person who makes a payment which qualifies as an "expenditure" under § 82025. The presence of coordination is legally significant because the First Amendment permits more regulation of coordinated expenditures.

This disparate treatment grew out of the distinction drawn between "expenditures" and "contributions" by the Supreme Court in *Buckley v. Valeo* (1976), 424 U.S. 1. The high court concluded generally that "expenditures" could not be made subject to governmental regulation unless they contained "express advocacy," or were coordinated with a candidate – in which case the expenditure was effectively a "disguised contribution," properly subject to regulation as such. The Supreme Court's rationale was neatly summarized in *Federal Election Commission v. The Christian Coalition* (D.D.C. 1999), 52 F.Supp. 45, 92:

> "The fact that the candidate has requested or suggested that a spender engage in certain speech indicates that the speech is valuable to the candidate, giving such expenditures sufficient contribution-like qualities to fall within the Act's prohibition on contributions."

The rules at issue in *Buckley* and *Christian Coalition* were, of course, federal statutes and regulations governing federal elections. The Commission's regulation 18225.7, adopted in 1995, covers essentially the same ground as the parallel federal regulation, although the Act refers not to "expressive coordinated" or "coordinated" expenditures, but to expenditures "made at the behest of" a candidate or committee. However, the Commission considered this expression to be largely synonymous with the coordinated expenditures described in federal case law and legal literature generally, as indicated by the opening sentence of the existing regulation:

> "'Made at the behest of' means made under the control or at the direction of, in cooperation, consultation, coordination, or concert with, at the request or suggestion of, or with the express, prior consent of."

The Commission has not limited the constitutional distinction recognized in *Buckley* to expenditures overtly *requested* by a candidate or committee. Like the FEC operating under the guidance of federal case law, the Commission has regulated expenditures in which a candidate or committee has had some threshold level of involvement, whether that involvement be demonstrated by an overt request, or by other evidence of interest in the expenditure, shown by actions "in cooperation, consultation, coordination, or concert with" the person making the expenditure.

The significance of establishing the presence or absence of "coordination" in a political expenditure (and therefore, the importance of regulation 18225.7) cannot be overemphasized. The *Buckley* court concluded that political speech could be regarded as campaign advocacy with the constitutionally required degree of certainty in just two cases. First, speech that explicitly calls for a particular action at the polls. Its status as campaign advocacy is guaranteed by an express directive to the voters.[1] Second, in the absence of "express advocacy," speech that is "coordinated" with a candidate may also be regulated. In such cases, the value of the speech to the candidate is guaranteed not by its language, but by the candidate's involvement.

The challenge remaining after *Buckley* is to develop satisfactory guidelines identifying the language that constitutes "express advocacy," and the conduct that amounts to "coordination" in political expenditures. Regulation 18225.7 serves the latter function.

Empirically, regulation 18225.7 is most frequently consulted on expenditures for campaign advertising – communications supporting or opposing the election of a candidate or passage of a ballot measure – in which candidates or committees have been involved in some fashion. This regulation does *not* establish whether such expenditures are "contributions," a term defined at length (including numerous exceptions) by § 82015 and regulation 18215. Regulation 18225.7 simply offers guidance to anyone who wants to know whether a particular expenditure was "made at the behest of" a candidate or committee.

The scope of regulation 18225.7 includes (but is not limited to) expenditures on communications conveying messages illustrated in the following four examples (Table One):

Example 1 – "Vote for Candidate X."	**Example 2** – "Vote for Measure Y."
Example 3 – "Candidate X is a Good Person."	**Example 4** – "Measure Y is a Good Idea."

The fundamental question is: does it matter whether an expenditure on these communications was made "at the behest of" Candidate X or the committee sponsoring Measure Y? In all four cases, the answer will often be "yes," given the various statutes that use the term "made at the behest of." The followup question is obvious: how does one determine if the expenditure was made at the behest of Candidate X or the "Yes on Y" Committee?

This is the question Regulation 18225.7 is designed to answer. Other resources may offer guidance in particular cases – Commission Opinions, Advice Letters, and a small body of

[1] This is speech containing "express advocacy." The definition of "express advocacy" is not settled in case law, but for present purposes it is enough to say that "Re-elect Candidate X" or " Vote Against Measure Y" communicate "express advocacy," which is lacking in messages that do not employ an equally direct call for voter action.

case law.[2] But the general rule is given in regulation 18225.7, with illustrative examples and exceptions intended to apply in the cases illustrated above. Staff proposes to amend this regulation to add more examples and exceptions, to clarify when, in a variety of typical circumstances, an expenditure is "made at the behest of" a candidate or committee.

B. The Scope and Function of Proposed Regulation 18550.1

At the September meeting, Diane Fishburn and Lance Olson suggested rewriting regulation 18225.7, limiting its scope to implementation of § 85500(b), a statute enacted in January, 2001 by Proposition 34. At the January meeting the Commission realized that the original proposal of Fishburn and Olson would have left the term "made at the behest of" without a definition anywhere in the Act, so discussion turned to adoption of a separate regulation implementing § 85500(b). This statute does not use the expression "made at the behest of," although it employs the language used in regulation 18225.7 to *define* "made at the behest of." The new statute provides as follows:

> "(b) An expenditure may not be considered independent, and shall be treated as a contribution from the person making the expenditure to the candidate on whose behalf, or for whose benefit, the expenditure is made, if the expenditure is made under any of the following circumstances:
> (1) The expenditure is made with the cooperation of, or in consultation with, the candidate on whose behalf, or for whose benefit, the expenditure is made, or any controlled committee or any agent of the candidate.
> (2) The expenditure is made in concert with, or at the request or suggestion of, the candidate on whose behalf, or for whose benefit, the expenditure is made, or any controlled committee or any agent of the candidate.
> (3) The expenditure is made under any arrangement, coordination, or direction with respect to the candidate or the candidate's agent and the person making the expenditure."

Section 85500(b) addresses the *kind* of conduct described in regulation 18225.7(a), but the statute applies only when that conduct occurs in circumstances where it is necessary to distinguish between an "independent expenditure" and a "contribution" to a candidate. Like federal law, the Act employs "independent expenditure" as a term of art, referring to the type of expenditure defined at § 82031:

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[2] One surprising objection at the January meeting to amendment of regulation 18225.7 was that the existing regulation has been clarified over the years in advice letters. Of course, this is no less true for rules applied to independent expenditures. But regulations are accessible to those who do not have the capacity to research old advice letters, which was the reason that amendment of regulation 18225.7 was originally proposed.

> " 'Independent expenditure' means an expenditure made by any person in connection with a communication which expressly advocates the election or defeat of a clearly identified candidate or the qualification, passage or defeat of a clearly identified measure, or taken as a whole and in context, unambiguously urges a particular result in an election but which is not made to or at the behest of the affected candidate or committee."

An "independent expenditure" therefore displays three defining characteristics: (1) it is an expenditure made in connection with a communication; (2) it contains "express advocacy" for the election or defeat of a clearly identified candidate or measure; and (3) the communication is *not* "made at the behest" of the affected candidate or committee.[3] Section 85500(b) *assumes* that an expenditure has been made in connection with a communication, and that the communication contains express advocacy of a clearly identified candidate. The sole function of the statute is to specify the circumstances under which the expenditure is regarded as "independent" of a *candidate* who benefits from the expenditure. It is important also to note that while § 82031 describes "independent expenditures" in both candidate *and* ballot measure contests, § 85500(b) addresses only "independent expenditures" in *candidate* elections.

Any expenditure for a communication that does not contain express advocacy lacks one of the defining characteristics of an "independent expenditure" as defined by the Act, and so necessarily falls outside the scope of § 85500(b). Of the four examples of campaign speech illustrated in Table One (page 3 above), § 85500(b) governs only Example 1, the message containing express advocacy for a candidate. Example 2 also includes express advocacy, but not relating to a candidate. Examples 3 and 4 do not employ express advocacy at all (there is no "clear plea for action"), and thus cannot be "independent expenditures" as defined by the Act.

There were comments at the last two meetings urging the necessity of a special regulation to implement § 85500(b), at the same time assigning a lower priority to a regulation defining "made at the behest of," which affects application of §§ 82015, 82031, 85303 and 85310. But, since § 85500(b) does not govern independent expenditures for ballot measures, a regulation implementing § 85500(b) cannot completely solve the "independent expenditure problem" without a second, parallel regulation articulating standards that describe coordination with ballot measure committees. No one suggests that "independent expenditures" are not a topic of importance in ballot measure contests.[4]

The Technical Assistance Division routinely answers questions on the application of regulation 18225.7 to advertisements corresponding to *all four* of the examples given in Table

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[3] "Clearly identified" is defined at subdivision (b)(1) of the Commission's "expenditure" rule, regulation 18225. "Expressly advocates" is defined in the same regulation at subdivision (b)(2).

[4] In the ongoing *ProLife* litigation, defendants have furnished evidence to the court that ballot measure advocacy by 1998 had become a "quarter billion dollar industry" in California, and the influence of ballot measures on California's legal landscape, from Proposition 13 to Proposition 34, can scarcely be overestimated.

One. And activities amounting to "coordination" among candidates, committees and their supporters are fundamentally the same from Example 1 through Example 4. Thus a regulation limited to an "independent expenditure" on behalf of a candidate (Example 1) should treat the very same interactions as a regulation governing an "independent expenditure" on behalf of a ballot measure committee (Example 2), or an "expensive, gauzy candidate profile" (Example 3).

C. *Two Regulations or One?*

Even though regulation 18225.7 has served as the Commission's "coordination" rule for a number of years, there is now some justification for a separate regulation governing "coordination" between a candidate and a person engaged in express advocacy on the candidate's behalf. But the utility of a separate rule has nothing to do with differences in the nature of coordination that might warrant segregation into different regulations. Indeed, their descriptions of "cooperation, consultation, coordination" and so on should be the same in all cases, unless a plausible reason for divergent rules can be articulated.

The justification for a separate regulation must be based on the language of § 85500(b). This new statute does not use the expression "made at the behest of," and to that extent there is an obvious problem when the Act's "coordination" rules are found in a regulation defining a term that does not occur in § 85500(b). Certain peculiarities of language in § 85500(b) also recommend a regulation drafted with that particular statute in mind. Differences in the opening sentences of regulations 18225.7 and 18550.1 illustrate this point.

Staff therefore recommends that the Commission adopt regulation 18550.1 to implement § 85500(b). At the same time, staff emphasizes the importance of the Commission's workhorse "coordination" regulation, whose importance is undiminished by the passage of § 85500(b). Apart from details reflected in their opening sentences, and in the application of regulation 18225.7 to committees, these regulations describe very much the same conduct. Both are regulations describing "cooperation, consultation, and coordination" in political speech. But they are not interchangeable. Because it is specifically focused on a single statute, regulation 18550.1 should be used in questions growing out of § 85500(b); regulation 18225.7 should continue to be applied in all other contexts when there is need to interpret the term "made at the behest of."

The Language of the Regulations

The remainder of this memorandum treats significant details of language not resolved in prior meetings. Attention is directed principally to questions remaining in regulation 18225.7, and to language unique to regulation 18550.1:

Proposed Amendments to Regulation 18225.7 (copy attached)

The current regulation provides guidance in determining the range of meanings applied to "made at the behest of," and such terms as "in cooperation, consultation, coordination or concert with." Subdivision (a) in the amended regulation is unchanged from the same subdivision in the current regulation. No changes to this subdivision were suggested at the January meeting.

Subdivision (b) – **Decision 1**. *Specific examples of expenditures "made at the behest of" candidates or committees.*

In the current form of regulation 18225.7, subdivision (b) states *presumptions* that certain described expenditures are "made at the behest of a candidate or committee," an important device which the amended version retains in subdivision (c). As presently written, however, the regulation offers its general definition in subdivision (a) without providing practical examples of expenditures that *are* "made at the behest of" candidates or committees. The public and the regulated community have repeatedly asked for guidance of this sort, and staff's principal focus in amending this regulation has been to add illustrative descriptions of typical expenditures considered to be, presumed to be, or considered *not* to be, "made at the behest of" a candidate or committee. Since the current regulation lacks a specific description of expenditures that will, in all cases, be characterized as having been made "at the behest of" a candidate or committee, staff has inserted a new subdivision (b) into the proposed regulation to cure that omission.

There was no real opposition to subdivision (b) at the January meeting, although one speaker did note that since the bulk of the language referred to coordinated expenditures on communications, this provision was more "appropriate" to regulation 18550.1, and need not appear in regulation 18225.7. But as explained earlier, this subdivision should appear in both regulations. The adoption of regulation 18550.1 does not remove electioneering communications from the purview of regulation 18225.7, which would still be the only regulation treating coordination in expenditures on express advocacy of ballot measures, and all communications that stop short of express advocacy. In other words, looking back at Table One on page three, regulation 18225.7 is the *only* regulation governing coordination in the communications described by Examples 2, 3, and 4.

Subdivision (c)

The current version of regulation 18225.7(b) contains presumptions, a topic discussed generally in prior memoranda. Staff will confine itself here to remarks on how the presumption subdivision can be improved. The concern that these presumptions are too easily rebutted offers a good starting point. The presumption of a fact that an expenditure was "made at the behest of" a candidate or committee is rebuttable, as provided under California Evidence Code § 604:

> "The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption."

This kind of presumption, in other words, describes the elements of a *prima facie* case that an expenditure has been "made at the behest of" a candidate or committee. If sufficient evidence is presented to establish a *prima facie* case, the respondent must then produce evidence contesting the presumed fact. The respondent is not required by the presumption to *prove* the nonexistence of predicate facts. Rather, if the respondent produces enough evidence to put the question "at issue," the trier of fact hears and weighs all the evidence from both sides, and decides the ultimate question by a preponderance of the evidence.

A facile assurance in a *pro forma* declaration, announcing simply that "there was no coordination in the expenditure at issue," states a legal conclusion, but no raw *fact* that a judge could mistake for evidence. Thus a respondent will have to offer something more than a conclusory averment. Presumptions that follow from a set of specific facts offer the parties and the judge guidance on what *is* required – the respondent must swear that one or more of the predicate facts is absent. A declaration of this sort would indeed shift the burden back to the prosecuting agency, but at the same time it would narrow and clarify the dispute.

Staff believes that this is a useful outcome, which demands neither too much nor too little from respondents. Staff has also pointed out in prior memoranda that the provisions of this regulation serve an educational function insofar as they warn the regulated community of conduct that *may* raise eyebrows. Without presumptions, the regulation would contain only descriptions of conduct that always, or never, amounts to "coordination," with an entirely unmapped area separating the safe extremes. Staff believes that the regulated community, and the public interest, is well served by signs pointing out dangerous turns in the road.

Subdivision (c)(3)(A) – **Decision 2**. *The "joint employment" presumption.*

Subdivision (c)(3)(A) treats the problem of "joint employment." The Commission thought that this was a reasonable presumption, but suggested that the language be narrowed to minimize the possibility that the presumption might be applied to lower-level campaign staff. The Commission also suggested that a "fundraising" presumption be incorporated into this subdivision, and that the presumption apply only to activities during the campaign for a single election. These changes have been made as directed, so that the presumption now applies to persons who have provided candidates or committees with "professional services related to campaign strategy or fundraising for that same campaign."

The Commission seemed to concur in January that a "joint employment" presumption is necessary in cases of simultaneous employment, in light of the obvious potential for wholesale, undocumented coordination between campaign and supporter through an intermediary who moves daily between one employer and the other, serving the interests of both. There was less agreement on application of the presumption in cases of serial employment.

Staff suggested that a presumption is necessary in cases of serial employment because, if there were no such presumption, persons wishing to avoid the consequences of simultaneous employment would simply restructure their formal relationships. A candidate and consultant might agree on a "revolving door" arrangement where the consultant would continue to further the interests of the candidate while producing campaign materials elsewhere, in the expectation of subsequent re-employment by the campaign. Or the candidate and the advertising agency might simply come to an understanding whereby the agency takes over the cost of the consultant, eliminating the need for subsequent re-employment. Arrangements such as these could be proven only in those rare cases where a disgruntled insider came forward.

A post-employment presumption *should* be limited in duration. In September, the Commission indicated that a twelve month duration for such a presumption was too long, and in January it seemed ready to accept the six month period included in the current draft. Because there is no limit on when primary campaigns may begin, and there is presently an eight month interval between statewide primary and general elections, staff believes that a six month period is sensible in this case.

Subdivision (c)(3)(B). Reproduction of campaign materials.

Debate over this subdivision was restrained in past meetings. The Commission felt that this presumption was reasonable, but should be limited to republication or dissemination of campaign materials "in whole or *substantial* part." The crucial term has now been added.

Staff Recommendations on subdivision (c)

The Enforcement Division strongly urges adoption of the new presumptions offered in the proposed regulation so that its staff will have clear guidelines for evaluating more incoming cases, and additional tools encouraging them to accept a class of particularly "troublesome" cases that might otherwise go unprosecuted because of the resources required to overcome especially difficult burdens of both production and proof. Enforcement staff also believes that both prosecution and defense resources will be conserved in cases subject to these presumptions since there is an incentive for respondents to produce evidence rebutting a presumption soon after a case is opened, without waiting for positions to harden during the "discovery" phase of litigation.

The Technical Assistance Division also urges adoption of the new presumptions, because they will educate the regulated community by more clearly indicating where the legal lines are drawn. On a more practical level, the amendments proposed here will provide authority for

Political Reform Consultants, who must explain the Commission's rules to members of the regulated community and the interested public. The presumptions now before the Commission are consistent with prior advice, but provide a more immediate source of authority.

Subdivision (d)

Subdivision (d) carries over two "safe harbor" rules from subdivision (c) of the current regulation, and adds six new ones outlining actions and circumstances where, without more, an expenditure is *not* "made at the behest of" a candidate or committee. Subdivision (d)(1) is an existing provision, amended to remove an unnecessary proviso and to include a similar rule concerning discussions unrelated to a campaign. Subdivision (d)(2) is the second of the current rules, with non-substantive stylistic amendments.

Subdivision (d)(3) is a new addition, suggested at the January meeting. The Commission has long advised that a prior contribution does not, by itself, establish "coordination" with a candidate or committee. This provision was not included in prior drafts of this regulation on the ground that it was a well established rule, but staff believes that requests to include it among the "safe harbor" rules indicate some need for explicit guidance on this point.

The Commission has seen subdivision (d)(4) in prior drafts of this regulation. Its function is to clear up the confused semantics of "at the behest of" and similar expressions ("at the request or suggestion of," etc.). Some observers have noted that *any* expenditure made in response to any candidate's public plea for support is, strictly speaking, an expenditure "made at the behest of" the candidate. However, unilateral responses to public campaign speech should not be made subject to regulation 18225.7. If they were, virtually all expenditures by all persons would be "made at the behest of" some candidate or committee, a result not consistent with a reasonable interpretation of "coordination" in the context of political campaigns.

Subdivision (d)(5) is similar, extending the theory of subdivision (d)(4) to appearances before membership organizations, a common type of event that allows the members to evaluate candidates or committees which the organization may later choose to endorse or promote. This provision specifies that such appearances do not, by themselves, amount to such coordination that subsequent expenditures would be deemed to have been "made at the behest of" the person making the appearance. The prior draft of this subdivision referred to "public" appearances before these organizations, but at the January several persons observed that these kinds of appearances are generally not open to the "public," so that restriction has now been removed.

There was also a request at the January meeting that the word "public" be removed from subdivision (d)(4) as well from subdivision (d)(5). However, since subdivision (d)(4) is not limited to a particular kind of gathering, removal of the word "public" – the only adjective modifying "request" in subdivision (d)(4) – would result in a provision that provided safe harbor to *any* expenditure in response to a request for support made in *any* context.

As currently written, subdivisions (d)(4) and (d)(5) construe express statutory references to payments or expenditures "made at the behest of" a person, which the Commission has earlier found to mean expenditures "made at the request or suggestion of, in cooperation…with…" etc. These new subdivisions carve out exceptions for public and "semi-public" requests, and are defensible constructions of statutory language because they still leave scope for applying the root meaning of "made at the behest of." Staff believes that a broad exception, which extends even to one-on-one requests, would impermissibly read the core idea of "request" out of the statutes.

Subdivision (d)(6) treats a different kind of problem, where the intent to make an expenditure is communicated to the candidate or committee on whose behalf the expenditure is made, but no further "campaign" information is conveyed beyond that bare fact. No legal or policy goal is advanced by a rule that an expenditure is "made at the behest of" a person whose role is so passive and limited. Nevertheless, the question comes up regularly, and both the regulated community and the Technical Assistance Division believe that this subdivision would anticipate many questions, and provide useful guidance on the safe limits of conversation between independent speakers and the candidates or committees they support.

Subdivision (d)(7), like subdivision (d)(4), treats expenditures that might, in a literal sense, be regarded as made "at the behest of" a candidate or committee. For example, when a candidate "behests" a contribution to *another* candidate, a literalistic application of the current regulation 18225.7 would result in the contribution being reported as a contribution to the "behesting" candidate, rather than to the candidate who actually receives and uses the money. To avoid this result, regulation 18215(d) specifically provides:

> "A contribution made at the behest of a candidate for a different candidate or to a committee not controlled by the behesting candidate is not a contribution to the behesting candidate."

Proposed subdivision (d)(7) applies an existing rule to candidates, and extends that rule (in accord with longstanding advice) to committees. Staff has been unable to discover a reason for dissimilar treatment of committees in this regulation, and a number of persons have urged that a general rule for "third party requests" be stated here to insure that it is not overlooked by persons unfamiliar with regulation 18215(d) and prior advice on this topic. There was no objection to subdivision (d)(7) at prior meetings.

Subdivision (e)

At the January meeting there was a further request from the regulated community that staff add a new "safe harbor" rule governing the exchange of information between or among committees. The thought behind this proposal was that, at least in many cases, committees should be able to communicate with each other free of concern that they might later become implicated in a "coordinated" expenditure as a result of their discussions. The translation of this proposal into an appropriately tailored regulation required a separate subdivision. As drafted, subdivision (e) permits free exchange of any information not amounting to a "payment" as

defined by § 82044. This limitation is necessary since some kinds of information have value in political campaigns, and the transfer of such information may be an "in-kind" contribution. An obvious example would be polling data. If a committee undertook a poll regarding an initiative measure, it could sell that information to a committee with an interest in that measure – or give it to that committee free of charge. In the latter case, the transfer of that information would normally be regarded as a contribution to the donee.

At present there is no comparable "safe harbor" provision. As written, staff believes that subdivision (e) provides the desired rule to the extent that a rule of this kind is feasible.

Subdivision (f)

The first sentence of subdivision (f) clarifies the usage of "candidate" and "committee" throughout this regulation by providing that these terms include the agents of candidates and committees, when the agents are acting within the course and scope of their duties.

The next two sentences of this subdivision were added as a result of comments at the January meeting. The second sentence responds to a perceived need to emphasize that the "expenditures" referenced in this regulation are payments classified as "expenditures" under § 82025 and regulation 18225. The third sentence specifies that this regulation is limited to defining the expression "made at the behest of," and in particular that an expenditure "made at the behest of" any person must be evaluated under § 82015 and regulation 18215 before the expenditure is classified as a "contribution." The last sentence describes the interaction between this regulation and regulation 18550.1, should regulation 18550.1 be adopted.

Proposed Regulation 18550.1 (copy attached)

As discussed more extensively in the introductory pages of this memorandum, staff proposes adoption of regulation 18550.1 (together with amendments to regulation 18225.7) to address a perceived need for a regulation implementing the recently enacted § 85500(b). That statute specifies circumstances under which an ostensibly "independent expenditure" will not be considered "independent." In short, § 85500(b) prescribes criteria establishing "coordination" with a candidate on whose behalf an expenditure is made. Not surprisingly, acts constituting "coordination" in this context are difficult to distinguish from acts that constitute "coordination" in other types of expenditures, so that some provisions of this regulation closely resemble those of regulation 18225.7. Discussion of regulation 18550.1 can be abbreviated where its provisions are similar to those just discussed in connection with regulation 18225.7.

The first paragraph of the proposed regulation tracks the language of the statute, and limits the application of this regulation to determining whether an ostensibly "independent expenditure" will nonetheless be treated as a "contribution" under circumstances to be described in subdivisions (a)(1) and (a)(2).

Subdivision (a)(1) distills the general rule given in the statute. Subdivision (a)(2) is more specific, describing communications between the candidate and the person(s) funding the communication. The language in subdivisions (a)(2)(A) and (B) is the same as the language discussed earlier in connection with proposed regulation 18225.7(b)(2)(A) and (B), but is applied here to candidates only. The function of this section is the same as that of regulation 18225.7(b), to describe actions that amount, in all cases, to "coordination" between candidate and supporter.

Subdivision (b) here corresponds to subdivision (c) of proposed regulation 18225.7, describing expenditures that are *presumed* not to be "independent" of a candidate. The four presumptions in this regulation are the same as the four presumptions in proposed regulation 18225.7(c). Finally, subdivision (c) is the "safe harbor" provision familiar from proposed regulation 18225.7(e).

Conclusion

To the extent that the Commission amends regulation 18225.7 along the lines suggested by staff, there should be few barriers to adoption of regulation 18550.1, if the Commission decides that it would be a useful supplement to the more general regulation. If the Commission chooses not to amend regulation 18225.7, staff recommends either that the Commission *not* adopt regulation 18550.1, or that it provide guidance to staff on what rules should apply to coordinated expenditures for ballot measures.

Attachments:

Amended Regulation 18225.7
Proposed Regulation 18550.1